IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6528

DAVID WAYNE BURKS,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The judgment of the district court was entered February 25, 1976 (A. 13). The order of the district court denying the motion for new trial was entered March 12, 1976 (A. 18). The opinion of the United States Court of Appeals for the Sixth Circuit was filed December 30, 1976 and is reported at 547 F.2d 968. Petitions to rehear by both the United States and the defendant were denied February 8, 1977. (A. 159-160).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered December 30, 1976. Petitions to

rehear filed by both petitioner and respondent were denied February 8, 1977. The petition for certiorari was filed April 11, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .

Rule 29(a) of the Federal Rules of Criminal Procedure provides:

> *Motion Before Submission to Jury.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses . . .

Title 28, United States Code provides:

> §2106. *Determination*
>
> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

QUESTIONS PRESENTED

1. Whether a retrial after a reversal for insufficient evidence violates the Double Jeopardy Clause of the Constitution.

2. Whether, assuming there is no violation of the Double Jeopardy Clause, the petitioner should be acquitted under 28 U.S.C. 2106 because just and appropriate.

STATEMENT

The petitioner Burks was charged with armed bank robbery in the Middle District of Tennessee. The petitioner entered a plea of not guilty by reason of insanity. At a jury trial in Nashville, two medical witnesses, a psychiatrist and psychologist, testified for the government. The psychiatrist could not give an opinion and the psychologist was ever asked for his opinion as to the sanity of the petitioner. Two psychiatrists and a psychologist called as witnesses by the petitioner testified he was legally insane within the meaning of the *Smith* test used in the Sixth Circuit. *United States v. Smith*, 404 F.2d 720 (C.A. 6).

A timely motion for a judgment of acquittal under Rule 29(a), F. R. Crim. P., was made at the close of all the proof and denied. (A. 145) The petitioner was found guilty and received a twenty year sentence.

The United States Court of Appeals for the Sixth Circuit found that the evidence was insufficient to sustain the verdict and reversed. Citing *Bryan v. United States*, 338 U.S. 552 and 28 U.S.C. 2106, the case was remanded to the district court to determine from a balancing of the equities whether a judgment of acquittal should be entered or a new trial ordered. This Court granted Burks' petition for certiorari June 13, 1977.

SUMMARY OF ARGUMENT

Appellate reversals for new trials after a finding of insufficient evidence to sustain the conviction violate the Double Jeopardy Clause of the Fifth Amendment. The Court has never given adequate consideration to the double jeopardy aspect of a reversal for insufficient evidence. *Bryan v. United States*, 338

U.S. 522, the leading case, failed to differentiate between appellate reversals for trial errors, for which there is a strong public policy favoring retrials, and reversals for insufficient evidence for which there is logically a strong public policy against retrials. To the extent that *Bryan* is based on the fact that a defendant "waives" his right to an acquittal for either lack of evidence or by seeking alternatively a new trial, that waiver doctrine was put to rest once and for all by *Green v. United States*, 355 U.S. 184.

In the event the Court does not wish to raise appellate reversals in the federal courts for insufficient evidence to a constitutional level, the Court under 28 U.S.C. 2106 should order the case dismissed as just and appropriate.

ARGUMENT

Introduction

The *Bryan* Rule and Its Historical Antecedents

"[I]t is well settled that there is no constitutional right to an appeal." *McKane v. Durston*, 153 U.S. 684. Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.[1] As the Court described this period in *Reetz v. Michigan*, 188 U.S. 505:

> 'Trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this Court. *Id.*, at 508.'
>
> *Abney v. United States*, No. 75-6521, decided June 9, 1977.

[1] "[3] Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted a statute allowing such appeals 'in all cases of conviction of crime the punishment of which provided by law is death.' Act of Feb. 6, 1889, 25 Stat. 656. A general right of appeal in criminal cases was not created until 1911. Act of March 3, 1911, 36 Stat. 1133."

Writing in *Green v. United States*, 355 U.S. 184, Justice Black said:

> The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, which greatly influenced the generation that adopted the Constitution, Blackstone recorded:
>
> > '. . . the plea of auterfoits acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.'
>
> Substantially the same view was taken by this Court in Ex parte Lange, 18 Wall 163, at 169, . . . :
>
> > 'The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'
>
> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The relationship between the double jeopardy clause and retrial after appellate reversal began with *Ball v. United States*, 163 U.S. 662, 672, when it was held a defendant could be retried

> because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment or upon another indictment, for the same offense of which he had been convicted.

Ball and its progeny rested on the theory that the defendant by

asking for a new trial had "waived" a double jeopardy defense. *Trono v. United States*, 199 U.S. 521. The plurality opinion in *Trono* said:

> We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment . . . No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it . . . he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense. 199 U.S. at 533.

Ball involved a reversal for a defect in the indictment. A comprehensive history of the Double Jeopardy Clause is given in *United States v. Wilson*, 420 U.S. 332.

This Court first considered the constitutionality of a reversal for a new trial after an appellate reversal for insufficient evidence in *Bryan v. United States*, 338 U.S. 552. After first deciding that 28 U.S.C. 2106 took precedence over Rule 29(a), F. R. Crim. P., petitioner's double jeopardy argument was given short shrift:

> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, involving denial of his motion for judgment of acquittal. '. . . where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial.' *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462. See *Trono v. United States*, 199 U.S. 521, 533, 534. 338 U.S. at 560.

The two cases cited in support of the Court's holding involved reversals for procedural errors, rather than for insufficiency of evidence. The holding in *Bryan* has been considered tangentially but never directly in *Sapir v. United States*, 348 U.S. 373,[2]

[2]Brief per curiam order that indictment be dismissed after appellate reversal for insufficient evidence. Impossible to tell if dismissal on constitutional grounds or §2106. Mr. Justice Douglas in a concurring opinion noted that a new trial would be double jeopardy. 348 U.S. at 374.

Yates v. United States, 354 U.S. 298,[3] and *Forman v. United States*, 361 U.S. 416.[4] See also *United States v. Tateo*, 377 U.S. 463, 466.[5] The holding in *Bryan* has been criticized by every court or commentator which has attempted an analysis.[6]

Many circuits have not repudiated *Bryan* but have strictly limited its application to cases wherein the accused requested a new trial in the district court or on appeal. These circuits, under the statutory authority of 28 U.S.C. 2106, have established the policy of directing acquittals following reversals for insufficiency of the evidence.[7]

[3]*Bryan* reaffirmed without discussion. "[W]e would no doubt be justified in refusing to order acquittal even where the evidence might be deemed palpably insufficient, particularly since petitioners have asked in the alternative for a new trial as well as for acquittal." 354 U.S. at 328.

[4]Attempt to reconcile *Bryan* and *Sapir*. Validity of *Sapir* implicitly recognized.

[5]*Bryan* apparently reaffirmed by way of citation.

[6]*Sumpter v. DeGroote*, C.A. 7, No. 76-1849, decided April 1, 1977; *United States v. Wiley*, 517 F.2d 1212, 1215-1217 (C.A. D.C. 1975); *People v. Brown*, 99 Ill. App. 2d 281, 241 N.E.2d 653, 661-62 (1968); C. Wright, *Federal Practice and Procedure*, §470, at 272-273; Thompson, *Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal*, 8 Ind. L. Rev. 497, 507-510 (1975); Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, U. Chi. L. Rev. 365, 367 (1964); Cahan, *Granting the State a New Trial After an Appellate Reversal for Insufficient Evidence*, 57 Ill. B.J. 448, 452-455 (1969); Mayers and Yarbrough, Bis Vexaris: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 6-7, 19-22 (1960); 8 Moore's *Federal Practice*, §29.09[2] at 29-57 (1976); Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 U.C.L.A. Law Review 81-84 (1967).

[7]*Green v. Massey*, 546 F.2d 51 (C.A. 5); *United States v. Howard*, 432 F.2d 1188 (C.A. 9); *United States v. Wiley*, 517 F.2d 1212, 1215-1221 (C.A. D.C. 1975); *United States v. Dotson*, 440 F.2d 1224, 1225 (C.A. 10); *United States v. Howard*, 432 F.2d 1188, 1191 (C.A. 9); *United States v. Williams*, 348 F.2d 451 (C.A. 4), *cert. denied*, 384 U.S. 1022. See also, *United States v. Fusco*, 427 F.2d 361, 363 (C.A. 7); *Wright, supra*, note 6, at 272; *United States v. Robinson*, 545 F.2d 301, 305, n.5 (C.A. 2).

The Sixth Circuit has been inconsistent. This case was remanded for a possible new trial. In another case, *United States v. Rosenbarger*, 536 F.2d 715, 721, after a reversal for insufficient evidence, the Sixth Circuit said: "To allow the Government on remand to submit additional proof . . . would violate the prohibition against double jeopardy contained in the Constitution."

I.

A RETRIAL AFTER A REVERSAL FOR INSUFFICIENT EVIDENCE VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION.

Bryan has been unanimously criticized insofar as it dealt with the double jeopardy issue.[8] The double jeopardy question received only cursory consideration in the last paragraph of the twelve-paragraph opinion.

Judge Bauer for the Seventh Circuit in *Sumpter v. DeGroote*, *supra*, wrote:

> Moreover, rather than serving the 'sound administration of justice,' we believe the *Ball* rule operates in practice as an engine of inequity when applied in cases such as *Bryan*. Unlike reversals due to procedural errors of law that impair effective presentation of the defendant's case, reversals based on the failure of the prosecution's proof represent the judgment of an appellate court that the defendant was entitled to a directed acquittal at trial. By subjecting defendants who win such appellate reversals to retrial, *Bryan* serves to heighten rather than mollify disparities inherent in our criminal justice system, for, had the defendants been before other trial judges, they may well have received the directed acquittals to which they were entitled—acquittals from which the prosecution would have no appeal. *Fong Foo v. United States*, 369 U.S. 141 (1962). By permitting defendants similarly situated with respect to their right to a directed acquittal to be treated differently, *Bryan* works to undermine rather than promote the fair and impartial administration of criminal justice.
>
> In summary, we believe that the premises of the fairness rationale for the *Ball* rule adopted in *Wilson*—the societal interest in punishing the guilty and the need to promote the sound administration of justice—do not require the rule's application in a case such as this. Sumpter was, by the

[8]The primary issue in *Bryan* was whether Rule 29(a), F. R. Crim. P. takes precedence over 28 U.S.C. 2106. *Held*, §2106 was controlling.

For authorities suggesting *Bryan* should be re-examined see n.6, *supra*.

> Indiana Supreme Court's own admission, not proven guilty of the crime of prostitution as defined by the Indiana law applicable at the time of her arrest and trial. The State, having been given an opportunity to vindicate its interest in trying her, had failed to establish the validity of its interest in punishing her. To permit the State a second bite at the apple in these circumstances would not only interject inequity into the administration of criminal justice but also serve to condone and perhaps perpetuate careless prosecutorial trial preparation and practice. (Footnotes omitted.)

It is said in Thompson, n.6, *supra*, at 506-507, 510:

> The Court in *Bryan* failed to note that the earlier cases upon which it relied involved reversals for procedural irregularities, and the evidence in those cases was sufficient to sustain the judgments. Without considering this distinction, the Court summarily applied the rule of *Ball* that a defendant who secures an appellate reversal of his conviction may not claim double jeopardy as a defense to retrial — regardless of the reason for reversal.
>
> * * *
>
> Moreover, if the Court were faced with the issue again, it is doubtful, at least in a federal case, whether it would continue to follow the *Bryan* rationale. The logic of the state court decisions and the emerging doctrine of appellate acquittal which has developed after the decision in *Forman* [*v. United States, supra*] is irrefutable. And the Court has not been reluctant in recent years to expand the application of the double jeopardy principle.

As said in Comment, 31 U. Chi. L. Rev. 365, n.6, *supra*:

> The cursory treatment given the double jeopardy problem in the *Bryan* case reveals the Court's feeling that no new, significant double jeopardy question had been presented.

Reversals for insufficient evidence as in *Bryan* present a significantly different double jeopardy question than do reversals for procedural errors. Furthermore, the waiver rationale of *Bryan* was rejected in *Green v. United States*, 355 U.S. 184.

A. Reversal for Insufficient Evidence Should Result In Acquittal Because Such Reversal Differs Significantly from Reversal for Procedural Error.

It was said in Comment, 31 U. Chi. L. Rev. 365, 371, 372:

> [T]he considerations which justify a new trial after a reversal for error are lacking where the reversal is for lack of evidence. Instead of a presumption that the burden of proof of the prosecution has probably been met, the appellate court is specifically holding that the burden has not been met. Society should have no more fear of releasing such a defendant than of releasing a defendant who has been acquitted by a jury, perhaps even less since a jury acquittal may be based on error or on an improper weighing of the evidence. Yet in the federal system and in most states, no appeal is allowed the state after an acquittal.
>
> Furthermore, there is no reason to fear that an appellate court judge, deprived of the new trial alternative, would affirm a conviction where he now would reverse and grant a new trial for insufficient evidence. In the federal courts it is not enough for a judge to feel that on his reading of the record he would have voted for acquittal. 'It is not for [a reviewing court] . . . to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' Thus where a judge now would be willing to reverse, he should have no objection to acquitting. He certainly should not prefer the conviction of a defendant where he not only would vote for acquittal himself but also thinks that there is no substantial evidence to support the trial court conviction.
>
> * * *
>
> No undue burden is imposed on society by releasing those defendants whose convictions have been reversed for lack of evidence. The oppression and harassment which the double jeopardy clause was designed to prevent is clearly present in a new trial following a reversal for insufficient evidence. For in the insufficient evidence case an appellate court is in essence saying, 'Well, the prosecution did not prove you guilty this time but they can have another chance.' Although it would not be necessary for the Supreme Court to raise the distinction between reversal for error and reversal for insufficient evidence to the stature of a constitutional principle—invocation of the Court's supervisory power might be considered more appropriate—the Court should explicitly recognize that the same considerations which prohibit a new trial where an accused has been acquitted at trial apply with equal force following an appellate reversal for insufficient evidence.

It is said in Thompson, *Reversals for Insufficient Evidence*, n.6 *supra*, at 501-502, 513, 514-515, 517-518:

> The arguments favoring application of the double jeopardy clause to appellate reversals for insufficient evidence are compelling. At the first trial the State exercised its opportunity to convict the accused and, as a matter of law, the evidence failed to establish guilt. Should the State be given the opportunity to buttress its case at a second trial or, for harassment only, seek a second guilty verdict on the same insufficient evidence? By reason of the insufficiency the judgment of conviction was reversed. Clearly, the defendant should have been acquitted in the trial court, and that acquittal would have barred a second trial for the same offense. Logic would dictate a similar result when the acquittal comes at the appellate level, for it is a miscarriage of justice that the defendant was not acquitted at trial.
>
> * * *
>
> There is no substantial difference between a defendant who requests a directed verdict and one who raises the issue for the first time in the motion to correct errors. Both are calling the attention of the trial court to the legal insufficiency of the evidence and are requesting appropriate relief. In either case the trial court is empowered to acquit the accused. A review of the policies underlying the double jeopardy provisions reveals no basis upon which such differential treatment could be grounded. Fundamentally, the State is given one opportunity, and one only, to convict a citizen of a crime. The purpose of the double jeopardy clause is to protect the individual from the hazards of repeated trials and possible conviction for the same offense.

* * *

[A] defendant who was improperly acquitted in the trial court is free from further prosecution. Yet a defendant who was entitled to acquittal in the trial court but was compelled to appeal from an improper conviction may be subjected to retrial. No justification for such disparate treatment exists. This injustice is especially pervasive when an appellant, who was wrongfully convicted, remains incarcerated pending his appeal because of his inability to make bail. Even though the costs of his legal defense may be borne by the county, an impecunious defendant pays for his retrial through loss of liberty.

Moreover, the effect of the present state of the law could be to afford broader constitutional protection to a defendant who is shown to be prima facie guilty. Even if palpably erroneous, a directed verdict of acquittal at the trial level could protect a guilty defendant from the hazards of retrial after a reversal of the conviction upon appeal. On the other hand, a defendant who is not shown to be prima facie guilty, and who in fact may be innocent, could be subjected to a new trial. Thus, the present state of the law in the context of individual cases is calculated to shield the guilty and persecute the innocent.

* * *

Different considerations are apparent with respect to reversals for reasons other than insufficient evidence. For example, when a reversal is based upon improper jury instructions or some pretrial procedural irregularity, a defendant may have been denied a fair trial even though the evidence of guilt was overwhelming. It is far better that a defendant be given a fair trial upon remand than to extend the harmless error doctrine as a basis for affirmance. In such a case, the accused was not entitled to acquittal in the trial court, nor should such relief be afforded in the appellate court. The security of the community at large may be preserved by a new trial while also securing the defendant's right to a fair trial. The defendant who is not shown to be prima facie guilty, however, in theory, represents no threat to the community. Whether the defendant in such a case is acquitted at trial or upon appeal should make no difference. In either case the accused should not be retried.

Moreover, the security of the community, preserved by the imposition of criminal sanctions, has never been the sole consideration of our criminal justice system. Even though defendants may be guilty, countervailing policies immunize from prosecution those who have been denied their rights to speedy trials or who have not been brought to justice within the statutory period. If public policy requires retrial of defendants acquitted upon appeal, it can also be argued that the same policy requires retrial of defendants acquitted in the trial court. In either case, the State may be able to develop additional evidence sufficient to support a conviction. The double jeopardy bar, however, was explicitly designed to prohibit this kind of continuing persecution of the accused.

B. The Petitioner Did Not Waive His Right to an Acquittal by Taking an Appeal.

Early decisions of this Court posited that the accused "waived" his double jeopardy rights by taking an appeal. *Murphy v. Massachusetts*, 177 U.S. 155, 158 ("[A] convicted person cannot by his own art avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy.")

United States v. Ball, 163 U.S. 662, 672 said:

> [I]t is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.

The *Ball* doctrine for years was unanimously accepted by the courts. The dominant theory was that the defendant, by successfully appealing his erroneous conviction, "waived" the protection against being retried for the same offense which the former judgment afforded him.

As said in Mayer and Yarbrough, n.6, *supra*, at 6:

> Yet it is obvious that a waiver rationale here, as elsewhere, serves only to state the conclusion without explaining the reason for it. The defendant, if given his

> choice, would prefer both to have and eat his cake; but the term 'waiver' connotes a voluntary act. Furthermore, the waiver theory must start with the assumption that the Constitution itself protects the defendant from a new trial after appeal, absent his consent. If this premise were correct, then Justice Holmes' criticism of the waiver rationale would seem indisputable: '[I]t cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution. . .' [*Kepner v. United States*, 195 U.S. 100, 135 (dissenting opinion)].

The "waiver" theory was dismissed by this Court in the double jeopardy decision of *Green v. United States*, 355 U.S. 184, 192 where the waiver argument was said to be "wholly fictional." The Court found a defendant convicted of a serious crime "has no meaningful choice" but to appeal his conviction. Such an appeal could not be termed a voluntary knowing relinquishment of a right. Cf. *Johnson v. Zerbst*, 304 U.S. 458.

C. The Petitioner Did Not Waive His Right to an Acquittal by Asking for a New Trial.

The petitioner seeks a new trial only as an alternative to a judgment of acquittal. Here, counsel at the conclusion of all the proof moved for a judgment of acquittal (A. 145). The petitioner is not asking to be tried over again. He is merely asking for his legal rights. Rule 29(a), F. R. Crim. P., provides the trial court "shall" acquit him "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

Mr. Justice Douglas in a concurring opinion in *Sapir v. United States, supra*, 348 U.S. 373, 374, wrote:

> If the petitioner had asked for a new trial, different considerations would come into play for then the defendant opens the whole record for such disposition as might be just.

Sapir was decided two years before *Green, supra* which held "wholly fictional" the old waiver rule. As said by the court in *People v. Brown*, 99 Ill. App.2d 281, 241 N.E.2d 653, 662 (1968):

> We can think of no reason in fairness and justice why a defendant on appeal should be required to discard his right to seek a new trial based on trial errors, in order to validate his right to seek an outright reversal for lack of evidence. In any sensible consideration of his position the former is seen to be a second-choice alternative to the latter. If his double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should then take effect only if the reversal is granted for the reasons contained in the new-trial request, and, if the conviction is reversed for lack of evidence, the waiver contained in an accompanying request for a new trial would never become operative.

Application of the waiver doctrine results in an anomoly. A trial court must ("shall") enter a judgment of acquittal as a matter of right to the defendant, whereas the appellate court has discretion to order a new trial. The unfairness is increased if we accept the proposition that appellate courts sitting in panels and with more time for reflection err less frequently than would a trial judge, especially since the trial judge would ordinarily make his decision without the written transcript.

> A defendant convicted on insufficient evidence is in a similar plight. He could, of course, serve his sentence and be free of a subsequent prosecution, but this is hardly an acceptable alternative. If he appeals on the ground that he should have been acquitted at trial, and the appellate court is in accord, why should he be any more subject to retrial than his counterpart who was acquitted at trial? By imposing a coerced waiver of the double jeopardy defense, courts penalize the accused for successfully attacking an erroneous judgment. The extension of the *Green* rationale to reversals for insufficient evidence would invalidate *Bryan* as a basis for remand and retrial. Thompson, n.6, *supra*, at 516-517.

The petitioner should not be denied a judgment of acquittal to which he is entitled on a theory this Court characterized as

"wholly fictional" in *Green, supra*. There is no reason why the defendant would "waive" an acquittal by asking for a new trial as alternative relief. Judicial notice could be taken that any defendant would rather have an acquittal than a new trial.

II.

ASSUMING THERE IS NO VIOLATION OF THE DOUBLE JEOPARDY CLAUSE, THE PETITIONER SHOULD BE ACQUITTED UNDER 28 U.S.C. 2106 BECAUSE JUST AND APPROPRIATE.

A literal absolutist interpretation of the Double Jeopardy Clause would not distinguish between reversals for trial errors or reversals for insufficient evidence. Policy considerations have determined over the years the scope of the clause. Justice Harlan in *United States v. Tateo*, 377 U.S. 463, 466 argued that appellate courts would be very reluctant to reverse a conviction if retrial were not available:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendant's rights as well as society's interest.

As a matter of fundamental fairness, apart from Fifth Amendment reasons, society has no interest in retrying a defendant against whom the evidence was insufficient at the first trial. The fairness rationale of *Tateo, supra*, would forbid a second trial in insufficiency cases in general for two reasons.

First, the prosecution must be on its toes to put forth all the evidence the first time. In both *Brown* and *Wiley, supra*, the prosecutors asked for retrials, pointing out that additional witnesses could be called the second time around. These arguments were rejected as fundamentally unfair. This point was illustrated by the court in *Brown*, n.6, *supra*, 241 N.E.2d 653, 660 n.3:

> In his petition for rehearing, the State's Attorney seeks to support his argument by noting that, in answer to a Bill of Particulars, the State listed 18 possible witnesses, whereas at the trial only 7 took the stand. We do not consider that an adequate representation has been made as to the additional evidence which would, with certainty, be presented at a new trial, even if this were clearly the only criterion for remandment. This case thus presents a good example of what we have in mind: at a second trial the State might use 10 or 12 witnesses and, if reversed again, maybe 15 would be presented at a third trial, and so on. Only one witness is claimed to have been unavailable (absent from the city) at the time of trial. The record does not disclose, however, that the State made any attempt to obtain a continuance on that account, pursuant to the Code of Criminal Procedure, Ill. Rev. Stat. (1965), ch. 38, §114-4(c)(2).

Having remanded for a new trial, it would appear to be impractical for a reviewing court to attempt control of such trial to insure that evidence more satisfactory to the prosecution would be introduced. The new trial could not very well be granted on that condition (even if we were to consider this a desirable procedure, which we do not), and, if it were, the standard would be impossible of practical application. Suppose, further, that the State were to introduce only the same evidence at the new trial and manage again to obtain a conviction. What then? Nor would an acquittal in this circumstance serve as a solution to the problem, because the constitutional guaranty is not against

a second conviction, but against being placed in repeated jeopardy through trial. See also, Cahan, n.6, *supra*, at 461.

Second, defendants may be treated unfairly by the same court. *Compare* the reversal by the Sixth Circuit in *United States v. Rosenbarger, supra, with* the Sixth Circuit's treatment of the defendant in this case.

In an earlier case where the Sixth Circuit reversed for lack of evidence of sanity of the defendant, the remand was to the district court for a hearing with instructions to grant a new trial or dismiss "unless the Government was unfairly prevented from producing competent evidence." *United States v. Smith*, 437 F.2d 538, 542. The remand in the instant case from the Sixth Circuit adopts a different standard in use in another circuit. See *United States v. Bass*, 490 F.2d 846, 852-853 (C.A. 5) (District judge may refuse to permit a retrial "if he finds from the record that the prosecution had the opportunity to develop its case . . . at the first trial.")

An egregious disparity of treatment was given as an illustration in Cahan, n.6, *supra*, at 449. Two defendants were convicted separately and independently of the crime of rape. Both cases were reversed by reviewing courts because the evidence was neither clear and convincing nor corroborated as required by law. One case was remanded for retrial and the other was reversed outright.

There is no evidence here that admissible evidence which would have made the Government's case was wrongfully withheld. No failure of the petitioner contributed to this failure of the Government to make a case. Using its power under §2106, the Court should order the entry of a judgment of acquittal if it finds no Fifth Amendment violation. The standards for the district judges on remand should be made uniform in each circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a judgment of acquittal should be ordered to be entered. If remanded, the standard should be a new trial only if the Government was unfairly prevented from producing evidence at the previous trial.

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